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Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Communication No. 9/2012

Views adopted by the Committee at its thirteenth session (25 March–17 April 2015)

Submitted by:	A.F. (represented by counsel, Giuseppe Luppino)
Alleged victims:	The author
State party:	Italy
Date of communication:	4 June 2011 (initial submission)
Document references:	Special Rapporteur's rule 70 decision, transmitted to the State party on 20 September 2010 (not issued in document form)
Date of adoption of decision:	27 March 2015
Subject matter:	Recruitment process; discrimination in the application of national legislation on the right to employment of persons with disabilities; facts and evidence.
Procedural issues:	Admissibility of claims *ratione temporis*; exhaustion of domestic remedies.
Substantive issues:	Work and employment
Articles of the Convention:	Article 27
Articles of the Optional Protocol:	Articles 2 (d), (e) and (f)

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Annex

Views of the Committee on the Rights of Persons with Disabilities under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (thirteenth session)

concerning

Communication No. 9/2012*

Submitted by:	A.F. (represented by counsel, Giuseppe Luppino)
Alleged victims:	The author
State party:	Italy
Date of communication:	4 June 2011 (initial submission)

The Committee on the Rights of Persons with Disabilities, established under article 34 of the Convention on the Rights of Persons with Disabilities,

Meeting on 27 March 2015,

Having concluded its consideration of communication No. 9/2012, submitted to the Committee on the Rights of Persons with Disabilities by A.F. under the Optional Protocol to the Convention on the Rights of Persons with Disabilities,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5 of the Optional Protocol

1. The author of the communication is A.F., an Italian national born on 9 January 1966. He claims to be a victim of a violation by Italy of article 27 of the Convention. The author is represented by counsel, Giuseppe Luppino. The Convention and the Optional Protocol thereto entered into force for the State party on 15 June 2009.

The facts as presented by the author

2.1 The author has suffered from Gaucher's disease since childhood and has a permanent 50 per cent physical impairment. He is under permanent treatment. In December 2005, the author was unemployed and registered at the unemployment office of the Province of Modena. His name was included in the list of unemployed persons with disabilities under Law No. 68/1999 of 12 March 1999 on regulations on the right to

* The following members of the Committee participated in the examination of the present communication: Mohammed Al-Tarawneh, Martin Mwesigwa Babu, Danlami Umaru Basharu, Monthian Buntan, Maria Soledad Cisternas Reyes, Theresia Degener, Hyung Shik Kim, Diane Kingston, Stig Langvad, László Gábor Lovászy, Carlos Alberto Parra Dussan, Safak Pavey, Ana Peláez Narváez, Coomaravel Pyaneandee, Silvia Judith Quan-Chang, Jonas Ruskus, Damjan Tatić and Liang You.

employment for persons with disabilities. The law provides for a bonus on social security tax fees and a funding scheme to adapt premises and working conditions to the needs of workers with disabilities. According to article 3 (a) of the law, at least 7 per cent of the workforce recruited by public employers with more than 50 employees should be persons with disabilities.[1] Article 7, paragraph 2, stipulates that public employers should reserve up to half of the positions to be filled by the competitive examination for persons with disabilities.[2]

2.2 In 2006, the author worked as an intern in a technical department of the University of Modena and Reggio Emilia. On 2 May 2006, the University published a competitive examination, under category C, to recruit a scientific technician for the engineering department. Considering that the position corresponded to his academic profile and work experience, the author took the examination. The preamble of the competitive examination of the University made reference to Law No. 68/1999. According to the author, under this law, persons with disabilities should be preferred to other candidates in case of equal results. The results of the public examination were officially published by Decree No. 595 of 22 September 2006; the author ranked third, with a score of 50.5/60.[3] As only one position was vacant, he was not recruited. On 17 April 2008, the University opened a second public competitive examination for a similar position, a category C position for a scientific technician. As that examination was reserved to former military personnel, the author could not take part in it.

2.3 The author argues that, despite always having ranked highly in all the public competitive examinations he has taken, he did not succeed in any of them as the 50 per cent quota determined by article 7, paragraph 2, of Law No. 68/1999 was never respected. On 17 February 2007, the author submitted a complaint to the Regional Administrative Court of Bologna requesting the suspension and cancellation of the public examination owing to the violation of article 7, paragraph 2, of Law No. 68/1999. He also requested that, should the Court validate the competitive examination, an equal position should be assigned to him, as he had been declared suitable for the post but had been denied the position owing to a misinterpretation of the law. On 7 May 2007, the Administrative Court rejected the author's complaint. It noted that the University was entitled to operate within the scope of an agreement it had signed on 20 December 2005 with the unemployment office of the Province of Modena to fulfil the 7 per cent quota, but that the agreement did not guarantee the selection and appointment of the author by the University. On 4 June 2008, the author

[1] Article 3 of Law No. 68/1999 determines that employers should reserve a quota for persons with disabilities in their enterprise, depending on the number of employees: 7 per cent of the staff should be persons with disabilities if the enterprise has more than 50 employees; there should be 2 persons with disabilities if the enterprise has between 36 and 50 employees; and there should be 1 person with a disability if the enterprise has between 15 and 35 employees. (Based on an unofficial translation.)

[2] Article 7, paragraph 1, of Law No. 68/1999 indicates that employers can select a person with disabilities and hire him or her by name by direct appointment, without the need to administer an examination, on the basis of the person's inclusion in a list of suitable candidates. Such appointments are possible in the following circumstances: (a) in all cases when the enterprise has between 15 and 35 employees; (b) in a proportion of 50 per cent of those hired when the enterprise has between 36 and 50 employees (the other 50 per cent will be selected depending on the ranking of the results of the examination); (c) in a proportion of 60 per cent of those hired when the enterprise has more than 50 employees. Article 7, paragraph 2, specifies that, in cases of a competitive examination, persons with disabilities have the right to be hired according to the quota established in paragraph 1 and "up to 50 per cent of the positions included in the competitive examination". (Based on an unofficial translation.)

[3] The first two candidates scored a total of 52.5/50 and 51/60, respectively (see Decree No. 595 of 22 September 2006).

appealed the decision before the Council of State, the highest administrative court. The Council of State dismissed the author's appeal on 4 December 2009, noting that the 50 per cent reserve quota for persons with disabilities did not apply to all public competitive examinations, but aimed to reach a general quota of persons with disabilities working in public entities, without consideration of the kind of position concerned. The Council of State also noted that the University had not failed to respect the 50 per cent reserve quota, "as 50 per cent of one post equalled zero".[4]

The complaint

3.1 The author claims that the examination organized in 2006 by the University of Modena and Reggio Emilia did not comply with the 50 per cent quota to be reserved for persons with disabilities in accordance with Law No. 68/1999, thereby violating article 27 of the Convention. He considers that the interpretation made by the University, according to which the 50 per cent quota of one post equals 0.5 positions, prevents it from respecting the quota. The author claims that "the correct application of the quota should either have resulted in [his] recruitment, as [he was] ranked third and was the only person with disabilities to have taken part in the competition, or in the recruitment of both [himself] and the person that came in first". The author argues that article 16, paragraph 2, of Presidential Decree No. 487/1994, which was also included in the preamble of the competitive examination, provides that he should have been recruited by the University of Modena and Reggio Emilia.[5] In the light thereof, the author considers that Decree No. 595 of 22 September 2006, through which the Administrative Director of the University of Modena and Reggio Emilia approved the results of the public competition in which the author had taken part in 2006, failed to recognize the author's right to be selected in application of article 7, paragraph 2, of Law No. 68/1999, thereby violating his rights under article 27 of the Convention.

3.2 The author also claims that the organization of a new public examination limited to military personnel in April 2008 to select a technician under category C, with the same profile as the one who was selected through the 2006 examination, amounted to another violation of Law No. 68/1999 and, therefore, of his rights under article 27 of the Convention. In that regard, he considers that the grading of the first public examination was still valid at the time of this second examination, and that he should therefore have been the subject of a direct appointment in application of article 7, paragraph 1, of Law No. 68/1999. The author alleges that the limitation of the second examination to military personnel was discriminatory against him, and that the misinterpretation of the relevant legislation by the State authorities made it impossible for him to find a job.

3.3 The author considers that the 2005 agreement between the University and the Province of Modena for the recruitment of persons with disabilities de facto nullifies article 27 of the Convention, the Constitution and the relevant provisions of domestic anti-

[4] Article 4, paragraph 2, of Law No. 68/1999 stipulates that, in calculations, fractions of a percentage that are above 0.5 are considered to constitute a whole. (Based on an unofficial translation.)

[5] No further detail is provided on this point, and no translation is provided of the relevant disposition. An unofficial translation of article 16, paragraph 2, of Presidential Decree No. 487/1994 reads: "Submission of preferential status and right to reserve: candidates belonging to the category defined by Law No. 482/1968 who have been declared suitable [for the position] will be included in the ranking of the selected persons as long as, as established by article 19 of Presidential Decree No. 482/1994, they are registered in the lists of the labour offices of the province and are unemployed either at the time of the deadline of the examination, or on the start date of employment". Law No. 482/1968 defines the categories of persons who can be given preference in the context of a public examination. It was abrogated by Law No. 68/1999.

discrimination laws.[6] The author argues that the practice of opening public competitive examinations for a single position is widespread in the University, as it thereby avoids the obligation to respect the 50 per cent quota prescribed by Law No. 68/1999. He also considers that most public competitive examinations that are open to persons with disabilities are for administrative rather than technical positions, and that this practice does not enable persons with disabilities to aspire to positions that correspond to their profiles and education. He considers that the decision of the Council of State, which identifies the 50 per cent quota as "a general quantitative measure of the number of persons with disabilities to be hired in public entities without consideration for the kind of position concerned", validates such a practice, in violation of the principles of equality and non-discrimination, as enshrined by article 27 of the Convention.

3.4 The author requests the Committee to declare that the conduct of the State party, including the decisions of the administrative tribunals, violates article 27 of the Convention; to request the University of Modena and Reggio Emilia to declare the author the winner of the competitive examination called in 2006 for the recruitment of a technician under category C, or to assign the author to a similar position as soon as possible; and to compensate the author for all the expenses and fees he has had to pay in the context of the judicial and administrative procedures he initiated, and in the context of the submission of the present communication.

State party's observations

4.1 On 12 August 2013, the State party submitted observations challenging the admissibility of the communication. It considers that most of the events referred to by the author took place before the entry into force of the Convention and the Optional Protocol thereto in Italy on 15 June 2009. In that regard, the State party refers to the publication of the results of the public competition organized by the University of Modena and Reggio Emilia, through Decree No. 595 of 22 September 2006; to the administrative procedure initiated by the author before the Regional Administrative Court of Bologna in April 2007; and to the rejection of his claim by the Court in May 2007.

4.2 The State party considers that the decision of the Council of State to dismiss the appeal of the author was not discriminatory, but was adopted in compliance with the provisions of Law No. 68/1999, under which the places "reserved for persons with disabilities" refer to the proportion of persons with disabilities who are employed, out of the total of employees. The Council of State also specified that Law No. 68/1999 does not have any impact on the profile and qualifications required for vacant positions for which the recruitment of new employees is necessary, and that no discrimination could be identified in the case of the author. The State party considers that article 97 of the Constitution supports the position of the Council of State with regard to vacant positions in the public sector, as it states that "public offices are organized according to the provisions of law, so as to ensure the efficiency … of administration".

4.3 The State party argues that Law No. 67/2006 on measures for the judicial protection of persons who are victims of discrimination, is a mechanism of judicial protection and has been implemented in favour of persons with disabilities who are victims of direct or indirect discrimination. The author has not taken advantage of this judicial protection, and

[6] The author refers to article 3 of the Constitution, Law No. 68/1999, International Labour Organization Convention No. 111 (1958) concerning Discrimination in Respect of Employment and Occupation and European Union Council Directive 2007/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

the State party therefore considers that his communication is inadmissible on the grounds of non-exhaustion of domestic remedies.

Author's comments on the State party's submission

5.1 On 30 September, 7 October and 26 November 2013, the author submitted his comments on the State party's submission. He considers that Law No. 67/2006, referred to by the State party, is not the only law that should be taken into account in the context of his case, as employment discrimination issues are generally covered by Law No. 216/2003, which provides guidelines in relation to employment and work conditions. Specialized departments in district courts are in charge of employment disputes in the State party. However, given that in the present case, their counterparts are represented by public administration (the University), administrative courts are the only ones that have jurisdiction.

5.2 In that regard, the author refers to the complaint he submitted to the District Court of Modena on 23 June 2009, with a view to receiving compensation on the grounds of discrimination. On 9 July 2013, the District Court rejected the author's application, stating that, in accordance with the consistent jurisprudence of the Italian Supreme Courts and Tribunals and with article 103 of the Constitution, only administrative courts have jurisdiction over his case. The author therefore considers that there is no doubt that only administrative courts have jurisdiction in the present case, and that all available domestic remedies have therefore been exhausted.

5.3 The author argues that submitting an additional application before a district court or another judicial body, as suggested by the State party, would amount to a violation of the principle of *ne bis in idem* and of the principle of avoiding conflicting judgements.

5.4 The author reiterates the arguments set forth in his initial complaint, providing additional details of the legal provisions that, in his opinion, should have been taken into account by national jurisdictions to address his case, the structure of the University of Modena and Reggio Emilia, and the type and quantity of vacancies for which he considers that he should have been taken into account automatically in view of the results he obtained in the 2006 public competition.

State party's additional observations

6.1 On 29 September 2014, the State party submitted its comments on the merits of the communication. The State party reiterates that the legal provisions referred to by the author, read together with article 97 of the Constitution, call for the psychophysical competencies of the candidate to be fully compatible with the functions of the position for which he or she has applied.

6.2 The State party argues that national jurisdictions rightly concluded that the University of Modena and Reggio Emilia did not adopt a discriminatory decision against the author and did not violate any of his rights enshrined in article 27 of the Convention, insofar as the author was able to take part in the public competition on an equal basis with others, and that he was not selected because two other candidates attained better results than he did in the public examination.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claims contained in a communication, the Committee must, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Convention.

7.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee, and that it has not been or is being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's argument that the relevant facts referred to by the author took place in September 2006 and April and May 2007, before the entry into force of the Convention and the Optional Protocol in Italy on 15 June 2009, and that the Committee is therefore not competent *ratione temporis* to consider the communication.

7.4 The Committee recalls that, in accordance with the general rules of international law, a treaty does not have retroactive effect whereby it could bind a party with respect to any act or fact which took place, or any situation which ceased to exist, before its entry into force for the State party concerned, unless provided otherwise in the treaty.[7]

7.5 The Committee observes that the decisions adopted in September 2006 and April and May 2007 were adopted before the Convention and the Optional Protocol entered into force for the State party, and therefore fall outside the scope of the competency of the Committee *ratione temporis*. However, on 4 December 2009, the Council of State fully examined the author's application and delivered the final decision on his claim of discrimination by the University of Modena and Reggio Emilia. The Committee notes that the Council of State did not merely examine formal aspects or errors of law in the previous decisions of administrative bodies, but examined the author's claim of discrimination on its merits. The Committee considers that, as the Council of State was the highest judicial instance competent to deal with the author's claim of discrimination,[8] its decision on the matter was the most relevant for the purpose of examining the claim of the author. The Committee also considers that the decision of the Council of State cannot be disassociated from the decisions of the administrative bodies refusing to hire the author, and that those findings constitute facts which the Committee is requested to examine. Accordingly, the Committee considers that it is not precluded *ratione temporis* from examining the present communication, as some of the judicial and administrative procedures initiated by the author took place after the entry into force of the Convention and the Optional Protocol for the State party.[9]

7.6 The Committee takes note of the State party's argument that Law No. 67/2006 provides persons with disabilities with a mechanism for judicial protection against discrimination, to which the author did not apply. The State party therefore considers that the author failed to exhaust the available domestic remedies.

7.7 The Committee notes that the author submitted an application before the District Court of Modena on 23 June 2009 with a view to receiving compensation on the grounds of discrimination, and that his claim was rejected on 9 July 2013 on the ground that only administrative courts had jurisdiction over his case. The Committee notes that the administrative jurisdictions, including the Council of State, concluded that the author did not suffer any form of discrimination. The Committee also notes that decisions of the Council of State can only be appealed before the Court of Cassation in cases of (a) excess of power; (b) excess of competence; (c) lack of jurisdiction; and (d) refusal of jurisdiction. According to the information before the Committee, the case of the author does not fall under any of those categories. The Committee also notes that for a complaint to be admissible under Law No. 67/2006, the complainant must demonstrate that he or she was a victim of direct or indirect discrimination. In view of the decisions of the administrative

[7] See communication No. 5/2011, *Jungelin v. Sweden*, para. 7.5.

[8] See the judgement of the District Court of Modena of 9 July 2013 (see para. 5.2 above).

[9] See *Jungeling v. Sweden* (note 7 above), para. 7.6.

jurisdictions that intervened in the case of the author, the Committee notes that the State party does not provide any argument that would enable the Committee reasonably to conclude that the remedy under Law No. 67/2006 could effectively be available for the author. Accordingly, it considers that domestic remedies have been exhausted.

7.8 As no other obstacles to the admissibility of the communication exist, the Committee considers that the communication is admissible.

Consideration of the merits

8.1 The Committee has considered the present communication in the light of all the information received, in accordance with article 5 of the Optional Protocol and rule 73, paragraph 1, of the rules of procedure.

8.2 In the present case, the question is whether the 2009 judgement of the Council of State amounts to a violation of the author's rights under article 27 of the Convention. The Committee notes the author's allegations that the judgement of the Council of State was discriminatory insofar as it rejected his claim for the suspension and cancellation of the public competitive examination in which he had taken part in 2006, thereby violating his rights as a person with disabilities under article 7, paragraph 2, of Law No. 68/1999.

8.3 The Committee recalls that, in accordance with article 27 (a), (e), (g) and (i) of the Convention, States parties have the responsibility to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions; to promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment; to employ persons with disabilities in the public sector; and to ensure that reasonable accommodation is provided to persons with disabilities in the workplace.

8.4 The Committee also recalls that it is generally for the courts of States parties to the Convention to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[10]

8.5 In the present case, the Committee considers that the author did not provide any element which would enable the Committee to conclude that the provisions of the national legislation and its application amounted to a violation of his individual rights under the Convention. The Committee also considers that the Council of State thoroughly and objectively assessed all the elements submitted by the author and the University of Modena and Reggio Emilia before reaching the conclusion that the non-selection of the author for the position for which he had applied was not discriminatory. The Committee considers that the author did not provide any evidence which would enable it to conclude that the decision of the Council of State was manifestly arbitrary or amounted to a denial of justice. In the circumstances, the Committee concludes that the decision made was based on objective and reasonable considerations. Consequently, the Committee is of the view that it cannot establish a violation of article 27 of the Convention.

9. The Committee on the Rights of Persons with Disabilities, acting under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, is of the view that the facts before it do not constitute a violation of article 27 of the Convention.

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[10] See *Jungeling v. Sweden* (note 7 above), para. 10.5.